# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 886, 887—September Term, 1969

(Argued July 8, 1970 Decided July 28, 1970)

Docket Nos. 34806, 34807

UNITED STATES OF AMERICA, *Appellee*

v.

SALVATORE BONANNO and PETER NOTARO, *Appellants*

Before: FRIENDLY, SMITH and HAYS, *Circuit Judges.*

Appeal from judgment of conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* on charges of mail fraud and conspiracy, in violation of 18 U.S.C. §§ 1341, 1342 and 371, and of appellant Bonanno on charges of perjury, in violation of 18 U.S.C. § 1621. Affirmed.

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., of counsel), *for Appellants.*

JAY S. HOROWITZ, Asst. U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, John M. Burns, III, Walter M. Phillips, Jr., and Jack Kaplan, Asst. U. S. Attorneys, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

Appellants were convicted after a jury trial in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* on one conspiracy count and fifty-two counts of mail fraud, in violation of 18 U.S.C. §§ 371, 1341, 1342. Appellant Bonanno was also convicted on two counts of perjury before a grand jury, in violation of 18 U.S.C. § 1621; appellant Notaro was acquitted on a single count charging the same offense. We affirm.

The facts center around the use by Bonanno and Notaro of the Diner's Club Credit Card of one Torrillo, their social acquaintance and business associate. They acquired the credit card through the efforts of the apparently violent-natured co-conspirator Perrone (deceased as of March 11, 1968), who visited Torrillo in January or February, 1968, and who allegedly intimidated Torrillo into surrendering his card and then departed with Notaro to give the card to Bonanno.

Bonanno and Notaro drove west for a sojourn in Tucson, Arizona, using the credit card and signing Torrillo's name for divers expenses along the way and for purchases once in Arizona. On one occasion Notaro represented himself to be Torrillo and used the credit card to convince a Tucson travel agent and an American Airlines employee to sell him on credit five airline tickets from Montreal to Tucson. In all, appellants charged fifty-eight bills totaling almost $2400; the bills were never paid.

The spending spree came to an end on March 11, 1968, when Bonanno, using Torrillo's credit card, attempted to make a moderate purchase at a Tucson department store and the sales clerk made a routine call to the Diner's Club Credit Approval Department in Los Angeles. The credit manager, desiring to question the card user, spoke briefly with Bonanno who claimed he was Torrillo and who affirmed that he still lived and worked at fictitious places invented by the credit manager. The manager thereupon directed the department store to destroy the card and return it to the Diner's Club.

The defense claimed that Torrillo or Perrone authorized the use of the credit card, that appellants intended to pay the bills, and that Notaro was unaware of any irregularities in the card's acquisition and use.

The perjury charges arose out of Bonanno's testimony before the grand jury that he stopped using Torrillo's credit card as soon as he heard of Perrone's death (Per-

rone died about seven hours after the card had been impounded), and that he had consulted several Tucson attorneys about the propriety of using Torrillo's credit card, each of whom advised him it was all right (at trial the mentioned attorneys controverted Bonanno's account).

Appellants' principal claim on appeal is that the trial judge should have granted their motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure due to newly discovered evidence which the prosecutor had failed to disclose to the defense. The new evidence was that at the time of trial, Torrillo, a major prosecution witness, was awaiting trial on an indictment in the same district on a securities fraud charge.

Five days after the verdict, counsel for Notaro informed the court that he had just learned of the indictment and that he would bring a motion for a new trial. The Assistant United States Attorney responded that he had first learned of the indictment against Torrillo a week before trial when he interviewed Torrillo. At that time Torrillo apparently told the prosecutor that on the day Torrillo was arraigned he met counsel for Bonanno at the courthouse and revealed to him the securities charge.

The government argues that whether or not Bonanno's counsel was actually informed of the indictment by Torrillo, the prosecutor was justified in believing that Torrillo had informed him. Any remaining fear by the prosecutor that defense counsel did not know of the indictment was apparently put to rest by the prosecutor's confidence in defense counsel's thoroughness in researching government witnesses (as demonstrated particularly by their cross-examination of Torrillo in this case) and by the fact that Torrillo's indictment was an easily accessible item of public record.

In addition to stressing the purported good faith of the prosecutor's belief that defense counsel were already aware of the indictment, the government contends that the prose-

cutor believed that in any event the indictment would have been inadmissible to impeach Torrillo's testimony since it did not charge a felony or a crime involving moral turpitude, and it was not at the time a conviction.[1] See *United States* v. *Acarino*, 408 F.2d 512, 515-16 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969).

First of all, as the government now admits on appeal, the existence of the outstanding indictment in the same district against a government witness is admissible evidence to show possible motivation of the witness to testify favorably for the government. See *United States* v. *Lester*, 248 F.2d 329, 334 (2d Cir. 1957). Even if the indictment were inadmissible at trial, this would not diminish its obvious value to the defense in preparing for trial and in giving it a lead to investigate possible governmental promises to the witness. See *United States* v. *Polisi*, 416 F.2d 573, 577-78 (2d Cir. 1969). Moreover, failing to disclose evidence valuable to the defense, even on the good faith belief by the prosecutor that it would be inadmissible at trial, deprives the defense of the opportunity to argue its admissibility and the court of its function of deciding the question.[2] Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 147-48 (1964).

Second, we agree with the trial judge that since Torrillo told the prosecutor that he had informed Bonanno's attor-

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[1] Subsequent to the trial, Torrillo changed his plea to guilty to conspiracy.

[2] "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion which the District Court sustained and no court has overruled until today. However, the case emphasized the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." *Griffin* v. *United States*, 183 F.2d 990, 992-93 (D.C. Cir. 1950).

ney of the indictment, "the prosecutor understandably, though erroneously, assumed throughout the trial that counsel for Bonanno and Notaro already knew of it." *United States* v. *Bonanno,* No. 68 Cr. 969, Unreported Opinion at 12 (S.D.N.Y. Feb. 15, 1970). But while such an assumption is understandable, it is not justified under the circumstances of this case. By failing to disclose the existence of the indictment against Torrillo on its assumption that the defense already knew of it, the prosecution served its narrow interest of securing a conviction at the peril of the diligent search for truth. There was nothing to be lost if the prosecution disclosed to the defense a fact it already knew; but if the defense did not already know, then nondisclosure by the prosecution resulted in the danger that a line of inquiry was foreclosed to the defense. Since the prosecution's belief was only an assumption, this danger was not insubstantial.

Moreover, at trial the defense vigorously attacked Torrillo's credibility by trying to establish a motive for Torrillo to testify favorably to the government against appellants, by attempting to show Torrillo's fears of prosecution on state charges and by pointing to the fact that Torrillo was never indicted for his admitted lies before the grand jury. This persistent defense attempt to show that Torrillo had a motive to cooperate with the government, together with the prosecutor's professed confidence in the thorough preparation of defense counsel, should have "flagged" the prosecutor's attention to the need to disclose the existence of the indictment by his office against Torrillo, since it was unlikely that the defense would intentionally forego such a useful piece of evidence.[3] See

[3] The argument that the defense may have intentionally avoided mention of the indictment against Torrillo as a trial tactic to avoid rehabilitative evidence by the prosecution that Torrillo in June, 1968, told essentially the same story to New York City police, is without moment. While prior consistent statements may be generally admissible to rehabilitate testimony impeached by evidence

*United States* v. *Miller*, 411 F.2d 825, 831-32 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968).

Nondisclosure by a government prosecutor of a known indictment by his office against an important government witness cannot be justified by assumptions that the defense already knows of the indictment or by self-serving judgments as to the admissibility of the indictment or its utility to the defense. See *United States* v. *Acarino*, 408 F.2d 512, 516 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); compare, *Leary* v. *United States*, 383 F.2d 851, 868 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969), with *United States* v. *Peterson*, 170 F. Supp. 251, 253 (D. Utah 1959). In the instant case, however, the nondisclosure was only negligent. Appellants concede that the nondisclosure was not an instance of deliberate suppression with purpose to obstruct the defense and that it was not a failure to disclose evidence whose high value to the defense could not have escaped the attention of the prosecution. See *Miller* v. *Pate*, 386 U.S. 1 (1967); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Alcorta* v. *Texas*, 355 U.S. 28 (1957). Nor is this an instance where the prosecution has suppressed favorable evidence after a request for it by the defense. See *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). In such instances of active prosecutorial misconduct, a lesser showing of the materiality of the undisclosed evidence will suffice. See *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *United States* v. *Miller*, 411 F.2d 825, 831-32 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d

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of a motive to testify, see, e.g., *United States* v. *Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957), the indictment against Torrillo (in May, 1968) antedated Torrillo's June, 1968 statements to the New York City police, and thus the alleged motive to cooperate was already present. In any event, the defense's desire to avoid rehabilitative testimony is an attenuated and self-serving hypothesis of why the defense failed at trial to bring the indictment to light. A more probable explanation is that the defense was unaware of the indictment.

Cir. 1968); *Kyle* v. *United States*, 297 F.2d 507, 513-14 (2d Cir. 1961).

Since the nondisclosure here was negligent, appellants must show that the indictment against Torrillo was material to the verdicts against them.

> "Negligent or even intentional failure of the prosecutor to disclose an additional item of impeaching evidence would not invariably require that a verdict be set aside. . . . The test, however, is . . . whether . . . there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

The materiality of the undisclosed evidence should also be "measured by the effect of the suppression upon defendant's preparation for trial. . . ."[4] *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 145-47 (1964). We conclude that disclosure to the defense of the indictment against Torrillo would not have aided significantly in its preparation for trial, and that defense use of Torrillo's indictment to impeach his trial testimony would not have raised a doubt in the minds of the jury as to appellants' guilt.

Torrillo's trial testimony dealt only with the manner that appellants acquired the credit card, allegedly through Perrone's intimidation of Torrillo. The central issue raised by the defense was whether appellants used the card in good faith. As the trial judge charged, the jury was entitled to convict appellants even if Torrillo had authorized

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[4] We stated this somewhat more generally:

> "The evidence must also be shown to be material and of some substantial use to the defendant." *United States* v. *Tomaiolo*, 378 F.2d 26, 28 (2d Cir. 1967).

the use of the card and even if appellants intended to pay the charges, so long as the jury found that appellants intended to mislead the various merchants by impersonating Torrillo in order to induce sales on credit which they believed would otherwise not have been forthcoming. See p. 4026, *infra*. The evidence of this latter intent to mislead merchants is overwhelming.[5] Whether or not the card was extorted from Torrillo bore only indirectly on the factual question of whether appellants intended to mislead merchants by impersonating Torrillo and signing his name. Moreover, even if Torrillo's testimony were discredited by evidence of a motive to cooperate with the prosecutor, this would only weaken the evidence of extortion of the card and would not bolster the defense's theory that the card's use was authorized.[6]

Appellants' other contentions require little discussion. Appellants claim that the judge's charge to the jury on

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[5] Some of the evidence is as follows: (1) Bonanno's abortive impersonation of Torrillo when talking on the phone with the Diner's Club Credit Department; (2) Bonanno's prior warning from a Tucson attorney that there was a forgery problem and that he should be careful; (3) Bonanno's offer to the same attorney to give him a suit if he could tell Bonanno where he could buy clothes with Torrillo's credit card; (4) and both appellants' use of other credit cards without permission and without payment; (5) Notaro's impersonation of Torrillo to purchase airline tickets on credit after a previous attempt had failed.

[6] Similarly, a defense question put to Torrillo about Torrillo's equity in Bonanno's house, bore only indirectly on whether Torrillo authorized the use of his credit card; to the extent Torrillo was secured against Bonanno's debts he would be less fearful of Bonanno's use of the card. And the alleged authorization by Torrillo itself was only one factor in whether appellants intended to defraud the merchants and the Diner's Club. In view of the marginal relevance of the question, the trial judge, in his discretion, was entitled to sustain the prosecution's objection in the absence of any evidentiary foundation for the inference that a possible indebtedness by Bonanno to Torrillo implied that Torrillo authorized the use of his credit card.

fraudulent intent deprived them of their defense of good faith use. The judge charged:

> "... if you find beyond a reasonable doubt that they [appellants] schemed to misrepresent themselves as Torrillo in order to deceive the Diner's Club and establishments into furnishing goods and services that would not have been furnished if they had disclosed their true identities, ... you may find that there was a scheme to defraud regardless whether the card was borrowed or extorted, regardless whether Perrone gave the defendants authority to use the card, and regardless whether they intended ultimately to pay for the goods and services.
>
> If on the other hand, you find that the defendants believed that their representations of their identity was immaterial, or that they had the right to use the card, you would find that there was no scheme to defraud."

The charge was substantially correct and we perceive no reason to require proof of intent to defraud the named credit card holder, Torrillo, when there was sufficient proof of intent to defraud sales establishments and the credit company by impersonating the signing the name of Torrillo. See generally, *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Baren*, 305 F.2d 527, 528 (1962).

Appellants' contention in regard to the prosecutor's mention of the manner of Perrone's sudden death on March 11, 1968, is without merit.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and seventy.

Present: Hon Henry J. Friendly, Hon. J. Joseph Smith, Hon. Paul R. Hays, *Circuit Judges.*

United States of America, *Plaintiff-Appellee,*

v.

Salvatore V. Bonanno, a/k/a Bill Bonanno, a/k/a Don A. Torrillo, and Peter Norato, *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
*Clerk*

A true copy,

A. Daniel Fusaro,

[seal] *Clerk.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Cr. 969

UNITED STATES OF AMERICA

against

SALVATORE BONANNO and PETER NOTARO, *Defendants.*

APPEARANCES:

ROBERT M. MORGENTHAU, ESQ., United States Attorney for the Southern District of New York, Attorney for United States of America, By WALTER M. PHILLIPS, JR., Assistant United States Attorney, United States Courthouse, New York, N. Y. 10007

ALBERT J. KRIEGER, ESQ., Attorney for Defendant Bonanno, 401 Broadway, New York, N. Y. 10013

LEONARD H. SANDLER, ESQ., Attorney for Defendant Notaro, 52 Broadway, New York, N. Y. 10004

MANSFIELD, D.J.

On November 14, 1969, after a five-day jury trial defendants were found guilty of conspiracy to violate 18 U.S.C. §§ 1341 and 1342, mail fraud (§ 1341) and use of a fictitious name or address in furtherance of a scheme to defraud (§ 1342). Bonanno was also found guilty of perjury based upon testimony given by him before a federal grand jury sitting in the Southern District of New York.

The essence of the conspiracy and mail fraud charges was that pursuant to a scheme to defraud defendants falsely represented themselves to be one Don A. Torrillo and by using a Diner's Club card issued to him induced commercial establishments, restaurants, stores and airlines on various occasions in the early part of 1968 to furnish property, meals and services which would not have been furnished if the establishments knew that the person presenting the card was not in fact Torrillo.

The proof was overwhelming that in the early part of 1968 defendant Bonanno obtained the Torrillo card and used it to obtain merchandise and services by falsely representing himself to be Torrillo and that on at least one occasion Notaro also did so. The Diner's Club card issued to Torrillo and the contract between him and the Diner's Club, both of which were received in evidence, required the signature of the authorized card holder, Torrillo, for any goods or services. There was extensive testimony by proprietors of various establishments to the effect that Bonanno or Notaro had defrauded them by falsely representing themselves to be Torrillo and by signing Torrillo's name in order to obtain the merchandise or services. A Tucson, Arizona, travel agent and an American Airlines ticket counter employee at the Tucson Airport testified to Notaro passing himself off as Torrillo and signing Torrillo's name in order to obtain airline tickets for five people from Montreal to Tucson.

The defendants' fraudulent spree ended in a Tucson clothing store on March 11, 1968, when the proprietor detained them while he telephoned the Los Angeles manager of the Diner's Club Credit Approval Department, who uncovered the fraud and instructed the proprietor to retain the card.

Defendants did not seriously dispute that they had used Torrillo's Diner's Club card and that in doing so they had falsely represented themselves as Torrillo for the purpose of obtaining goods and services. An issue was raised, however, as to the existence of an intent to defraud on their part, defendants contending that the circumstances indicated merely that they had borrowed the card with Torrillo's consent, intending ultimately to pay for the goods and services obtained through use of the card. Although Bonanno did not take the witness stand, Notaro did so and testified that he thought Bonanno had authority from Torrillo.

As proof of defendants' intent to defraud, the Government introduced extensive evidence, including various misstatements made by Bonanno when he sought to pass himself off as Torrillo upon being interrogated by the manager of the Diner's Club Credit Approval Department on March 11, 1968; testimony of a Tucson attorney, Sobel, that he told Bonanno to be careful about using the card because of the "forgery" problem; the extent and amount of the bills run up by defendants through use of the card (some 58 bills amounting to almost $2,400); the fact that Bonanno had previously used a Mobil Oil credit card issued to a friend, William Levine, without Levine's authority; Notaro had earlier used the name "Peter Joseph" in opening an account with the Southern Arizona National Bank, upon which he then drew a check which was returned for insufficient funds; the fact that Notaro had on an earlier occasion used a credit card issued to a person named "Miller" to obtain airline tickets; and other similar circumstances.

In addition to the foregoing, the Government also offered the testimony of Don A. Torrillo, the authorized holder of the Diner's Club credit card used by the defendants, who testified that he never authorized either of them to use the card, that in late January or early February, 1968, one Samuel "Hank" Perrone, a mutual friend of himself and defendants, who is named as a co-conspirator in the indictment, visited Torrillo's home and in a threatening manner demanded and obtained the card from him and joined Notaro in an automobile. Torrillo further testified that thereafter he took no action because of his fear of the defendants and Perrone, and described an earlier incident in which Perrone had struck and knocked down an old man. Torrillo conceded that shortly prior to Perrone's taking the card from him Torrillo had, as an accommodation to Perrone and Bonanno, gone with them to a travel agency and personally used his Diner's Club card to purchase for them two airline tickets after advising them that the agent would not accept their personal check. On that occasion,

however, Torrillo himself signed his signature as the authorized card holder.

On cross-examination defense counsel brought out that on March 11, 1968, Perrone died, and that on April 17, 1968, Torrillo, after having been unsuccessful in getting Perrone, prior to his death, to pay for the two airline tickets purchased in January, and after receiving numerous bills that had been run up on his Diner's Club card during February and March, wrote a letter to the Diner's Club stating that he had lost his card and had previously reported the theft to them by letters dated February 2, 1968, and March 7, 1968. On May 28, 1968, at the instance of a Diner's Club representative, Torrillo signed an affidavit to the effect that the card had been lost or stolen on or about February 1, 1968. Torrillo testified that the statements about having lost the card and previously reporting the loss were false, and that upon being called to testify before a federal grand jury in July, 1968, he falsely testified that he had sent letters to Diner's Club. However, on the same occasion he also testified before the grand jury that the card had been taken from him by Perrone. At no time did Torrillo testify or advise anyone that he had authorized Bonanno or Notaro to use his Diner's Club card. Torrillo's explanation for his false statements to the effect that the card had been lost was that he was afraid of reprisal at the hands of Perrone and, after Perrone's death, at the hands of the "structure" or organization. It appears that Perrone was shot dead on March 11, 1968.

Defendants' counsel were afforded wide latitude in their cross-examination of Torrillo and took advantage of the opportunity to cross-examine him thoroughly in an effort to discredit him generally as a witness and specifically with respect to his testimony that he had never authorized Perrone or either of the defendants to use his Diner's Club card. For instance, in addition to bringing out the fact that Torrillo had falsely stated under oath to the Diner's Club and the grand jury that he had lost his card on or

about February 1, 1968, and had reported the loss earlier to the Diner's Club, cross-examination revealed that he had not been indicted for perjury because of his false testimony (later corrected) before the federal grand jury in the Southern District of New York, that he had grossly overstated his income in applying to the Diner's Club for the card, and that he had falsely described himself as an electrical engineer and as a person having various degrees, including a Ph.D., B.S. and M.S.E.E. (Master of Science and Electrical Engineering). It was also brought out that he had prior real estate business dealings with Bonanno and Perrone and apparently had sufficient collateral in property acquired by Perrone in an earlier real estate deal to cover the charges run up by Bonanno and Notaro on his card.

For purposes of cross-examination defendants' counsel had available to them transcripts of Torrillo's 1968 grand jury testimony and, by subpoena, informal interrogations by New York City police which took place in Torrillo's office on June 25, 1968, and July 9, 1968, prior to any interrogation before the federal grand jury. Tape recordings of the police interrogations had been made without Torrillo's knowledge, and the trial judge, after examining the transcripts, made available to defense counsel those portions of the tapes and transcripts relating in any way to the subject matter of this case or Torrillo's direct testimony. After defense counsel had reviewed the transcripts of the New York City police interrogation of Torrillo, he was recalled to the stand for further extensive cross-examination in which counsel for each defendant confronted him with statements made to the New York City police. However, although there were some minor inconsistencies between Torrillo's testimony at trial and the statements made to the New York City police in June and July, 1968, the essential facts stated to the police were consistent with the version later given at trial. The tapes revealed, for instance, that Torrillo told the police about his use of his

card to purchase the two airline tickets in January 1968 as a favor for Perrone and Bonanno. Although he initially hedged on the question of whether the credit card had been lost by him, he then revealed to the police that the card had been taken from him by Perrone on the latter's visit to his home and that he (Torrillo) falsely reported and swore to the Diner's Club that his card had been lost when in fact he knew that it had been taken from him by Perrone.

Neither Torrillo's statements to the police nor his federal grand jury testimony, both given within a few months after the events in question, support defendants' contention that he authorized Perrone or defendants to use his card. On the contrary, on June 25, 1968, he told the police that Perrone "came to my house and just to get rid of him I gave him the card," and on July 9, 1968, he told the police that "they [referring to Perrone and Bonanno] sort of bullied me into giving it [the Diner's Club card] to them in the first place" and "Perrone came over to my house to get the card . . . you know what I mean, so then at that point I'm saying to myself . . . how am I going to get out of here, you know, so then they took the card and I didn't hear from them. . . ." He further advised the police that he had been shocked when Perrone had "hit" and "socked" the older man who was in his late 50's or early 60's.

At the trial defendants' counsel urged that Torrillo's trial testimony was false and that the story given by him to the police had been motivated by the desire to help the police in prosecuting Bonanno. This argument was to some extent supported by the later dismissal of the New York City charges against Torrillo.

On November 19, 1969, five days after the jury's verdict finding both defendants guilty, Notaro's counsel, Leonard Sandler, advised this court that he had just learned that Torrillo, along with various others, had been charged as a defendant in an indictment filed on May 28, 1968 in the Southern District of New York, 68 Cr. 471, alleging viola-

tions of federal securities laws, to which he pleaded not guilty on June 4, 1968, which was pending in November 1969 when the present case was tried. On December 19, 1969 and December 23, 1969, defendants Notaro and Bonanno, respectively, moved for a new trial pursuant to Rule 33, F.R.Cr.P., on the ground that the pendency of the indictment constituted newly discovered evidence which the Government had failed to disclose to the defendants and which, if disclosed, would have enabled the defendants to impeach Torrillo before the jury by eliciting and contending he was motivated to favor the Government by the prospect of benefit in the disposition of the pending criminal charges against him. Defendants further contended that such impeachment of Torrillo might have led the jury to conclude that he voluntarily gave his Diner's Club card to Perrone, authorizing him to use it, rather than that it was extorted or taken by fraud, with the result that the jury might have acquitted the defendants. In addition defendants move for a new trial on other grounds discussed below.

There can be little question about the fact that a prosecutor owes an uncompromising duty, in the absence of explanatory circumstances, to disclose to defense counsel the existence of a pending criminal prosecution by his office against a witness called by him to testify for the Government. Such a disclosure gives defense counsel the opportunity, which may or may not be exercised as counsel see fit, to explore on cross-examination the nature of the pending criminal charge and the possibility that the witness may be motivated to testify favorably for the Government in the expectation that he will gain some consideration in the disposition of its pending case against him. Although the prosecutor's failure to comply with this duty may under some circumstances necessitate a new trial, see, e.g., *Peterson* v. *United States,* 170 F. Supp. 251 (D. Utah 1959), it does not automatically constitute a denial of due process or mandate such a disposition in every case. See *Leary* v. *United States,* 383 F.2d 851 (5th Cir. 1967), *reversed on*

*other grounds,* 395 U.S. 6 (1969). In determining whether a new trial should be ordered, we are called upon to consider the materiality of the pending criminal prosecution, the deliberateness of the prosecutor's conduct in failing to make it known to defense counsel, whether there was a lack of diligence on defendant's part, and whether, if the fact had been known and used by defendants at trial, there is a likelihood that it would have significantly affected the chances of acquittal. After carefully reviewing the record and considering the matter in light of these criteria, we do not believe that a new trial is warranted here.

We are not here dealing with a deliberate suppression of evidence potentially helpful to the defense, which would call for application of constitutional standards applied in cases involving denial of due process. See, e.g., *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Miller* v. *Pate,* 386 U.S. 1 (1966); *Napue* v. *Illinois,* 360 U.S. 64 (1959); *Giles* v. *Maryland,* 386 U.S. 66 (1966). The evidence was never requested by defense counsel. Nor did the Assistant United States Attorney in charge of the case intentionally withhold from defense counsel the existence of the pending securities fraud indictment against Torrillo, which was wholly unrelated to the charge against Bonanno and Notaro. In fact he did not learn of the charge against Torrillo until a week or so before trial of the present case when he met Torrillo for the first time as a prospective witness and in the course of an interview learned of the indictment. At that time Torrillo advised him that Albert Krieger was present in Room 318 (the criminal calendar part of this court) when Torrillo pleaded not guilty to the securities fraud indictment and Krieger discussed the matter with Torrillo. Since the charge against Torrillo was a matter of public record, the prosecutor understandably, though erroneously, assumed throughout the trial that counsel for Bonanno and Notaro already knew of it. For reasons hereinafter stated, their failure to use the pending indictment for impeachment upon cross-examination of Torrillo would appear as sound defense tactics, since the contention that he was testifying

favorably for the Government in the hope of gaining a benefit would be countered by showing that he had earlier given to the New York City Police the same version as he gave at trial, which would only serve to rehabilitate and strengthen the witness.

In the absence of any deliberate suppression or any request by defense counsel the most that can be said is that the prosecutor was negligent. Although the question is not entirely clear, the standard of materiality to be applied in determining whether a new trial should be granted, at least in this Circuit, appears to be whether the evidence "would probably have raised a reasonable doubt as to . . . guilt in the mind of a conscientious juror," *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *United States ex rel. Romeo* v. *McMann*, — F.2d — (2d Cir. Nov. 17, 1969), or whether there appears to be "a significant possibility that the undisclosed evidence might have led to an acquittal or hung jury," *United States* v. *Miller*, 411 F.2d 825, 831 (2d Cir. 1969). Other circuits have used different approaches to the issue. See, e.g., *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) (whether the failure to disclose "might have" influenced the verdict), *Luna* v. *Beto*, 391 F.2d 329 (1967), 395 F.2d 35 (5th Cir. *en banc* 1968), *cert. denied*, 394 U.S. 966 (1969).

After a careful review of the trial record, we fail to find any significant possibility that the pendency of the indictment against Torrillo, had it been known to the jury, might have raised a reasonable doubt as to the defendants' guilt. Their contention is based upon the assumption that the jury might have inferred that, although Torrillo had authorized the defendants to use his credit card, he testified to the contrary in the hope that he would thereby gain some benefit in the pending prosecution against him. There are fatal flaws in the argument. The most striking defect is that prior to his being called to testify before the federal grand jury, which was the first occasion of any communication on his part with the United States Attorney's office

with respect to the matter, Torrillo gave to the S— O'Neil and Groggins of the New York City Police Department a statement that was substantially in accord with his trial in the present case. The New York City Police were unaware of the pending federal indictment against Torrillo. Accordingly there was never any suggestion that Torrillo might receive consideration from federal authorities if he cooperated with them and in any event it would have been apparent to Torrillo that they were powerless to help him in the federal arena.

We next note that when Torrillo thereafter appeared before the grand jury he testified falsely that he had written letters to Diner's Club to the effect that his card had been lost or stolen. In so testifying he was, as he had earlier indicated to the New York City Police, concerned about the fact that he had given a false affidavit to the same effect to the Diner's Club representative. However, on the same occasion he told the grand jury what he had already admitted to the New York City Police, that the card had been taken from him by Perrone rather than lost or stolen. There is therefore no support for defendant's argument based upon the pending indictment against him. Torrillo at no time ever testified or indicated that he had authorized Perrone or the defendants to use the card and hold themselves out to be Torrillo. In the one earlier instance when he purchased airline tickets for Perrone and Bonanno, there was no fraud; Torrillo personally used and signed his own card to obtain the tickets for them.

Lastly, we note that the independent evidence of defendants' fraudulent use of Torrillo's credit card was overwhelming. Thus, even if it be assumed *arguendo* that the card had been lost rather than taken from him, their guilt in inducing establishments to furnish property, meals and services on the false representation that they were Torrillo was firmly established.

There is conflicting evidence on the question of whether at least one of the defense attorneys, Mr. Krieger, knew

of the pending indictment against Torrillo. Torrillo states under oath that he told Krieger about the indictment on the occasion of Torrillo's entering a plea of not guilty to it on June 4, 1968 in Room 318, and that Krieger was present. He is corroborated by the court records for that date which show that Krieger was present in Room 318 on two other cases. Mr. Krieger, replying under oath, while conceding that he met Torrillo outside of Room 318 on the same date, denies knowledge of the indictment. It becomes unnecessary to resolve this issue, since the present motion must be denied for the reasons stated.

Defendants further moved pursuant to Rule 33, F.R.Cr.P., for a new trial on the grounds that they were prejudiced by the fact that some jurors were aware of a connection between the defendant Salvatore Bonanno and one Joseph Bonanno, his father, a reputed underworld Mafia figure, and by the disclosure at trial that Perrone was apparently murdered. Each prospective juror was independently examined on the voir dire out of the presence of all other jurors, which resulted in the elimination of any jurors who indicated they would be affected by anything previously heard or read with respect to Joseph Bonanno. Nearly all jurors finally selected had never heard of Joseph Bonanno. The one or two who had heard of him clearly and unequivocally stated that they were able to judge the case solely on the evidence to be introduced and not be affected by anything they had previously heard about the Bonannos. As for the reference to the death of Perrone, since Torrillo's state of mind was actually put in issue by defendants and he testified that in the period after Perrone's death he did not reveal all of the circumstances regarding Perrone's taking of his card because of his fear of defendants, Perrone's violent death was not wholly irrelevant. However, in the exercise of our discretion we instructed the jury, when the fact was mentioned by one witness, not to consider the circumstances of his death in judging the case against the defendants. Under all of the circumstances we are convinced that the defendants received a full and

fair trial by a jury which rendered a verdict based solely on the evidence that was admitted for its consideration.

Defendants also have subpoenaed from the Police of New York City and Nassau County wiretaps of conversations participated in by defendant Bonanno and they have been permitted to listen at length to tape recordings of these conversations. Since the conversations proved not to be related to the subject matter of this case or furnish any information that might be construed as leads through which the present case was developed, no motion to suppress has been made.

For the foregoing reasons the defendants' various motions, including renewal of motions made at trial for judgment of acquittal on the ground that the evidence was insufficient to sustain the convictions, are denied.

It is so ordered.

WALTER R. MANSFIELD
*U.S.D.J.*

Dated: February 18, 1970.